

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 14 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

ALSING TARJI RATHWA

Versus

STATE OF GUJARAT

Appearance:

MS BANNA S DUTTA for Petitioner
MR K.C. SHAH, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 11/02/98

ORAL JUDGEMENT(Per S.M.Soni, J.)

The appellant-original-accused in Sessions Case No.17/90 has challenged in this appeal the judgment and order of conviction dated 3rd December, 1990 holding the appellant guilty of offence punishable under section 302 of the Indian Penal Code and imposing rigorous

imprisonment for life.

2. The facts of the prosecution case are as under:

The complainant, Kapuria, P.W.1 was coming back after reaping paddy with bundles of paddy in company of his brother Chaturbhai (now deceased), Kaliabhai, Pejliben, Bhachliben and Gajliben. They were coming from their field known as Khadawala. When they were little away from their street near the field of Bachuria Chandubhai, the appellant (referred as accused hereinafter) and 6 others were sitting with their bow and arrow in the field. Seeing the complainant and his companions, they stood up. Accused raised bow and shot arrow which injured deceased Chatur Mochi from the left side between 9th and 10th rib. On being injured, said Chatur ran some distance, however, fell down. As the complainant and his companions were being chased by the accused they also ran in different directions. Accused have, thereafter, ran away. The complainant then immediately went and informed his father, Police Patel and sarpanch of the village, when he was advised to go to Police Station and lodge a complaint. He then went to Kwant police station where the complaint was recorded. The complaint was recorded against the accused and 6 others. Offence was registered. Investigation was carried out. On completion of the investigation, all the accused were chargesheeted in the court of Judicial Magistrate, First Class, Chhotadepur. The learned Judicial Magistrate, First Class, then committed the case to the Court of Sessions at Vadodara.

3. Learned Additional Sessions Judge, Baroda, camping at Chhotadepur framed charge against all the 7 accused under section 147, 148, 302 read with 149 of the Indian Penal Code and section 37(1) read with 135(1) of the Bombay Police Act. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution examined necessary witnesses to prove the charge levelled against the accused. On completion of the evidence for prosecution further statement of the accused was recorded. From the said statement, it appears that the defence of the accused is of total denial. Learned Addl. Sessions Judge after hearing the learned advocates for the prosecution as well as the defence recorded conviction under section 302 qua accused No.1/appellant herein. However, he acquitted all other accused Nos.2 to 7. This order of conviction is under challenge in this appeal.

4. Learned Advocate Ms Banna Dutta has challenged

the conviction on the ground that the oral evidence led by the prosecution is not acceptable inasmuch as the same is not supported by any independent witness. She also contended that from the record it emerges that even one accepts the case as put by the prosecution, then also the prosecution has failed to prove the identity of the accused beyond reasonable doubt. She further, in the alternative, contended that in the facts of the case, the case against the accused would squarely fall within the purview of section 304 part II but not in any case under section 302 of the Indian Penal Code.

5. Learned APP, Mr K.C.Shah supported the judgment and order of the learned Addl. Sessions Judge. Mr Shah contended that there was sufficient visibility at the time of the incident as the incident took place when the sun was about to set. Mr Shah further contended that the accused are not unknown to the complainant side. On the contrary, there was long drawn enmity between the two on a dispute of land. Mr Shah further contended that immediately on the arrow being shot and struck to deceased, P.W.1 and 3 who were present at the scene of offence have seen the accused who then ran away. Mr Shah further contended that the present case would squarely fall within the purview of section 300 and no interference is called for by this Court.

6. The question whether the identity of the accused is established or not can be answered by the evidence of P.W.1 and 3. P.W.1 is the brother of the deceased who with his deceased brother and brother Kalia, P.W.3, with three of his sisters were returning home after reaping paddy from their field. They were carrying with them the paddy also. When they were just passing through a foot-track in between the field of Bachuria Chandu and Rayliben Dalu, they saw accused sitting in the field. Accused having seen the complainant and others stood up and accused No.1 raised bow and shot arrow which struck deceased Chaturbhai Mochi. Arrow struck on his left side between 9th and 10th rib. Chaturbhai on being injured ran some distance fell down and died there. This part of evidence is also supported by P.W.3 Kalia. From the nature of cross-examination of these two witnesses, it appears that an attempt is made to show that they have not seen the accused or the person who shot the arrow. Fact remains that P.W..1 had immediately gone to his village which was very near and had informed police patel, surpanch and his father. He then, immediately went to police station and lodged a complaint wherein the names of all the 7 accused were disclosed. It is clear from the evidence of these eye witnesses that the

incident took place when the sun was about to set. In view of this fact, there is no hesitation on our part to accept that there was sufficient light at the time of the incident.

7. It is suggested by the learned advocate for the appellant-accused that it was not possible for these witnesses to see the accused as it is clear from the evidence of these witnesses that they have run away immediately on the arrow having struck the deceased. It is true that that they have tried to run away, which in our opinion, is natural conduct. But it does not mean that they ran away without looking in the direction from where the arrow came. The accused belonged to their village. The accused are known to the witness. After striking the arrow even if they are not seen face to face by P.W.1 and 3, then also by their movement they could have been identified. This apart, the deceased is the brother of P.W.1 and 3. After the incident immediately police patel and the surpanch and the father of the deceased were informed and therefore complaint was registered, wherein the names of all the accused are disclosed. We do not find any reason not to accept the version of P.W.1 and P.W.3 in view of the observations of the Supreme Court in the case of Prasad Mahato v. State of Bihar (AIR 1993 SC 2477). Therein the Supreme Court has observed as under:

"The evidence of Bhola Mahato, PW-7, through which we have been taken with the assistance of the learned counsel for the appellant is straightforward and cogent. His testimony to the effect that he had been told by PW-2 and PW-3 of having seen the appellant coming out of the house of the deceased with a blood-stained balua was not at all questioned in the cross-examination. Nothing else was also elicited in the cross-examination to discredit his testimony or throw doubts on his veracity. Being the son of the deceased, he would be the last person to let go of the real assailant and substitute him by an innocent person."

8. Learned advocate for the appellant has contended that P.W.1 has stated in his evidence that the accused came from opposite side while P.W.3 does not say from which direction they have come. However, the fact remains that an arrow was struck from the side which injured the deceased on the left side. When persons are standing in a field it is difficult to say whether they are facing each other or on the side of each other. It

may be that by some movement in the field by the accused, the attention of the persons might have been drawn. It is the case of the prosecution that when these persons saw the accused, they stood up in the field and shot arrow. At the time when the accused stood up who were sitting in the field, that movement might have alarmed the prosecution witnesses Nos.1 & 3 and others and their attention might have gone in that direction and they might feel that they are facing each other. In our opinion, this part of contradiction is of no significance. Another aspect is that P.W.3 says that except him, all others ran away. But running away does not mean that while running they have not seen the accused. Therefore, the evidence of P.W.1 and 3 as accepted by the learned Addl. Sessions Judge, does not call for any interference. The fact is established that it is accused No.1 who shot the arrow which struck the deceased on his left side.

9. P.W.2 Dr. P.U.Shah has performed autopsy on the dead body of said Chotiabhai. In autopsy incised wound at 9th ICS in mid axillary line 4 x 2 cm left side is found. However, internal injury shows that there is a rupture at bone left side Haemothorax; rupture at base, diaphragm ruptured, internal wall of the belly is ruptured; Haemoperitoneum arrow inside the cavity is found, liver is ruptured, spleen is also found ruptured. Cause of death is the internal haemorrhage due to injury to vital organs. Thus from these internal injuries, it appears that the arrow had entered on the left side 9th ICS in mid axillary and had damaged lung, liver and spleen and the belly portion. These injuries suggestive of depth of the wound. Thus it is clear from the evidence of the doctor that the deceased has died of said injury.

10. The question is whether the accused can be said to be guilty of offence punishable under section 302 of IPC in view of the facts stated hereinabove. Facts as per the prosecution case are to the effect that the deceased in company of P.W.1 and 3 and his three sisters was going from his field towards his house. When they were passing on a foot-trade in between the field of Bachuria Chandu and Rayliben Dalu, accused who was sitting in the field stood up and shot arrow and ran away. Reason suggested by the prosecution for this shooting of arrow is the previous dispute of land. We may mention at this juncture that there is no immediate quarrel between the two and the alleged cause of enmity is a remote one. There is nothing on record to show that there was immediate cause or reason for the accused to

assault any of the PW1, 3 or their deceased brother or sisters. There is nothing on record to show that any of the accused have anything particular against any of those who were passing on the foot-track. It is only that when the accused who were sitting in the field saw these persons, they stood up and struck arrow and ran away. These facts, in our opinion, would not by itself constitute an offence to fall within the purview of section 300. Section 300 of the Indian Penal Code reads as under:

"300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or --

2ndly -- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or --

3rdly -- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or --

4thly -- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

We have not referred to exceptions and explanation as in our opinion they are not relevant for the purpose of this case. Taking one after another clauses of section 300, it can be said that the case of the accused does not fall within the purview of any of the same. We may make it clear at this juncture that it is not a case of any of the prosecution witnesses that the arrow was aimed at a particular person and for a particular side. The fact remains that the arrow was struck. It was the misfortune of victim Chaturbhai that it fell on him. Thus from the facts it can be inferred that neither there was an intention to cause death of Chaturbhai or any one of them nor they very well knew that the arrow will strike to a particular person at a particular side. Neither the person nor the side was intended by the accused. Possibility that in seeing these P.W.1 and 3 and their brother and others accused might have a fear complex in

their mind and to escape from that place they might have struck the arrow. This possibility cannot be ruled out. However, their act cannot be said to be not committing any offence. Therefore, to bring in a case under section 300 either an intention or a knowledge is required which in our opinion is absent in this case. The question is, therefore, in which provision of the Penal Code the act of the accused will fall. In our opinion, it would squarely fall within the purview of part 2 of section 304. Section 304 reads as under:

"304. Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;
or with imprisonment of either description for a term which may extend to ten years or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

Thus, from the evidence of the doctor, it is clear that the act of the accused is a culpable homicide. In our opinion, it does not amount to murder. However, that culpable homicide is punishable as it does not fall within any of the exceptions under the Penal Code. For such offence punishment provided under section 304 Part II is imprisonment for a term which may extend to 10 years or with fine or with both. The appellant-accused in the instant case was arrested on 6.10.89. The order of conviction is recorded on 3rd December, 1990. Since the date of his arrest, he is not released on bail. Therefore, practically he has undergone sentence of about eight years or so. In view of this fact, we would like to pass an order of sentence already undergone.

11. In the result, the appeal is partly allowed. Order of conviction under section 302 of Indian Penal Code is set aside. Appellant-accused is convicted under section 304 part II and is ordered to undergo rigorous imprisonment already undergone. The appellant-accused is ordered to be released forthwith if not required in any other case. Order accordingly.

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(vjn)